

New South Wales Law Reform Commission, <i>Report 106 Community Justice Centres</i> (Sydney: 2005).....	¶8-016 fn 314
<i>Proposal for a Regulation of the European Parliament and of the Council on Online Dispute Resolution for Consumer Disputes (Regulation on Consumer ODR)</i> COM (2011) 794	¶4-004 fn 184
<i>Report of the Committee on Hong Kong Arbitration Law</i> (HKIAC, Hong Kong 2003).....	¶7-002 fn 218, 220
G Sharp, “iMediate”, Kluwer Mediation Blog, April 2012.....	¶4-004 fn 187
United Nations Commission on International Trade Law, <i>Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules A/CN.9/WG.III/WP.117</i> (2012)	¶4-004 fn 186
Department of Justice, <i>Paper No RF 1/13, Terms of Reference of the Regulatory Framework Subcommittee of the Mediation Steering Committee</i> (Hong Kong)	¶8-017 fn 333
IMI Code of Professional Conduct	
Art 2.2	¶2-026 fn 157
Art 3.2	¶2-026 fn 157

Table of Contents

About Wolters Kluwer Law & Business	iii
Foreword	v
Preface	vii
Abbreviations	ix
Table of Cases	xi
Table of Legislation.....	xxiii
Other Materials to which Reference is Made	xxxiii
Introduction	1
¶0-001 Overview	1
¶0-002 Background to the Mediation Ordinance.....	2
¶0-003 The Structure and Content of the Mediation Ordinance.....	5
¶0-004 Section-by-section Annotation of the Mediation Ordinance	6
Section 1. Short Title and Commencement	8
¶1-001 Section 1(1)	8
¶1-002 Section 1(2)	8
Section 2. Interpretation	9
¶2-001 “Agreement to Mediate”.....	9
¶2-002 Mediation Clause.....	11
¶2-003 Mediation Clause: Multi-tiered Dispute Resolution Clauses	12
¶2-004 Mediation Clause: Variation of Mediation Clauses.....	15
¶2-005 Mediation Clause: Implied Mediation Clauses	16
¶2-006 Mediation Clause: Waiver of Mediation Clauses.....	17
¶2-007 Mediation Clause: Doctrine of Severability in Relation to Mediation Clauses	17
¶2-008 Mediation Clause: Drafting Enforceable Mediation Clauses	18
¶2-009 Mediation Clause: Guidelines for Drafting Enforceable Mediation Clauses	24
¶2-010 Mediation Clause: Stay of Proceedings.....	24
¶2-011 Mediation Clause: Mediation Agreements	25

¶2-012	Dispute	26
¶2-013	Mediated Settlement Agreement.....	27
¶2-014	Mediated Settlement Agreement: “Some or All”	27
¶2-015	Mediated Settlement Agreement: Absence of Statutory Mechanism to Enforce Mediated Settlement Agreements.....	28
¶2-016	Mediated Settlement Agreement: Ordinary Contracts.....	28
¶2-017	Mediated Settlement Agreement: Settlement Deeds	30
¶2-018	Mediated Settlement Agreement: Arbitral Consent Awards	30
¶2-019	Mediated Settlement Agreement: Court Ratification of Mediated Settlement Agreements	33
¶2-020	Mediation	34
¶2-021	Mediation Communication	34
¶2-022	Mediation Communications during Preliminary Meetings.....	35
¶2-023	Mediation Communications during and in between Substantive Mediation Sessions.....	36
¶2-024	Mediation Communications in Relation to Follow-up Meetings	36
¶2-025	“Agreements to Mediate” and “Mediated Settlement Agreements” are not “Mediation Communications”	37
¶2-026	Mediator.....	38
¶2-027	Section 2(2) Reference to the Parties to Mediation	39
Section 3. Objects of this Ordinance		40
¶3-001	General Note	40
Section 4. Meaning of Mediation		42
¶4-001	General Note	42
¶4-002	Nature of the Mediation Process: Section 4(1).....	43
¶4-003	Mediation Sessions and the Activities that Attach to Mediation: Section 4(2)	45
¶4-004	The Role of Technology in Mediation: Section 4(3).....	47
Section 5. Mediation and Mediation Communications to which this Ordinance Applies		49
¶5-001	Agreement to Mediate	49
¶5-002	Place of Mediation: Wholly or Partly in Hong Kong	50

¶5-003	The Agreement to Mediate Provides that this Ordinance or the Law of Hong Kong is to Apply to the Mediation.....	51
¶5-004	Exclusion of Schedule 1 Processes.....	52
¶5-005	Exclusion of Schedule 1 Processes: General.....	53
¶5-006	Exclusion of Schedule 1 Processes: Multi-tiered Dispute Resolution: Med-arb and Arb-med.....	54
¶5-007	The Relationship between Mediation Communications and Mediation.....	56
¶5-008	Temporal Scope of MO to Agreements, Mediations and Mediation Communication	56
Section 6. Application to the Government.....		59
¶6-001	General Note.....	59
Section 7. Provision of Assistance or Support in Mediation		60
¶7-001	Non-lawyers and Foreign Lawyers may offer Assistance and Support in Mediation.....	60
¶7-002	Background to Section 7	61
Section 8. Confidentiality of Mediation Communications		65
¶8-001	Sections 8 to 10: Confidentiality and Admissibility of Mediation Communications in Evidence	66
¶8-002	On Confidentiality	66
¶8-003	Three Types of “Confidentiality”	67
¶8-004	Confidentiality in Hong Kong Prior to the Mediation Ordinance	68
¶8-005	The Impact of the MO on the Common Law	74
¶8-006	Insider-outsider Confidentiality.....	75
¶8-007	Confidentiality: All Persons are Bound by the Duty of Confidentiality	75
¶8-008	Confidentiality: Mediation Communications: the Parts of the Mediation that are Protected.....	76
¶8-009	Confidentiality: Mandatory Nature of Section 8	77
¶8-010	Remedies for Breach of Section 8	77
¶8-011	Exceptions to Confidentiality	79
¶8-012	Ordinary Exceptions to Confidentiality.....	80

¶8-013	Ordinary Exceptions to Confidentiality: (a) Consent	81
¶8-014	Ordinary Exceptions to Confidentiality: (b) Information Available to the Public.....	82
¶8-015	Ordinary Exceptions to Confidentiality: (c) Information Otherwise Subject to Discovery and Similar Procedures	83
¶8-016	Ordinary Exceptions to Confidentiality: (d) Danger of Injury to a Person or Serious Harm to the Well-being of a Child	84
¶8-017	Ordinary Exceptions to Confidentiality: (e) Research, Evaluation and Educational Purposes.....	87
¶8-018	Ordinary Exceptions to Confidentiality: (f) Legal Advice	90
¶8-019	Ordinary Exceptions to Confidentiality: (g) Requirement Imposed by Law	91
¶8-020	Exceptions Subject to the Leave of the Court or Tribunal.....	91
¶8-021	Exceptions Subject to the Court's Leave: (a) Enforcing or Challenging a Mediated Settlement Agreement	92
¶8-022	Exceptions Subject to the Court's Leave: (b) For the Purpose of Establishing or Disputing an Allegation or Complaint of Professional Misconduct.....	98
¶8-023	Exceptions Subject to the Court's Leave: (c) Other Purposes Considered "Justifiable in the Circumstances of the Case" ...	100
Section 9. Admissibility of Mediation Communications in Evidence.....		103
¶9-001	General Note	103
¶9-002	Application of Section 9	103
¶9-003	Mediation Communications.....	104
¶9-004	Requirement to Seek Leave and Consequences of Failure to Do So	104
¶9-005	Mediators and Others Giving Evidence.....	105
¶9-006	"Any Proceedings"	107
¶9-007	With Leave of the Court or Tribunal	107
Section 10. Leave for Disclosure or Admission in Evidence		108
¶10-001	General Note	108
¶10-002	Power to Grant Leave for Mediation Communications to be Admitted in Evidence	109
¶10-003	Factors to be Considered in Granting Leave.....	111

¶10-004	Court or Tribunal Specified.....	118
Section 11. Consequential and related amendments		119
¶11-001	General Note.....	119
What the Mediation Ordinance does not Cover		121
¶12-001	Four Pillars of Mediation Regulation	121
¶12-002	The Internal Process of Mediation.....	122
¶12-003	Accreditation of Mediators	124
¶12-004	The Impact of Mediation on Legal Limitation Periods	126
¶12-005	Mediator Immunity.....	128
Appendix A Mediation Ordinance (Cap. 620)		131
Appendix B The Hong Kong Mediation Code and Sample Agreement to Mediate		153
Appendix C Hong Kong International Arbitration Centre Mediation Rules		161
Appendix D Recommendations of the Report of the Working Group on Mediation relating to the Mediation Ordinance		165